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## **EXECUTIVE SUMMARY**

Substitution of analog Channel 39 for the analog Channel 14 allotment at Boise, Idaho as proposed by KM Communications, Inc. ("KM") would serve the public interest by facilitating a settlement of a comparative proceeding that was first filed with the Commission in December 1995, by resolving objections raised by certain land mobile radio licensees that operate on frequencies adjacent to Channel 14. The land mobile radio licensees suggested that an alternate channel be substituted for Channel 14, and KM initially stated that it was agreeable to a channel substitution only if the Commission made the channel change on its own motion. KM later filed its petition for rule making, just prior to the Commission's July 25, 1996 freeze on petitions for rule making to change the analog television table of allotments, to put a specific channel substitution proposal before the Commission. In the event that operation of a new television station on Channel 14 would cause interference to existing land mobile radio operations, the proposed channel change would serve the public interest by avoiding such interference.

In these Comments, KM restates its present and continuing intention to promptly construct the new station to serve Boise upon a grant of a construction permit. KM also has demonstrated that its proposed channel change is entitled to cut-off protection from competing proposals, and would not adversely impact any Class A television or Class A-eligible low power television station. This matter is more than ripe for Commission action, and therefore KM respectfully requests prompt action on the proposed channel substitution, as well as its pending settlement and application.

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Section 73.606(b),	)	MM Docket No. 01-85
Table of Allotments,	)	RM-9039
Television Broadcast Stations	)	
(Boise, Idaho)	)	

To: Chief, Video Services Division

**COMMENTS OF KM COMMUNICATIONS, INC.**

1. KM Communications, Inc. ("KM"), by its counsel,<sup>1</sup> and pursuant to Sections 1.415 and 1.420 of the Commission's rules, 47 C.F.R. §§ 1.415 and 1.420, respectfully submits these Comments in support of the amendment of Section 73.606(b) of the Commission's rules, 47 C.F.R. § 73.606(b), the Television Table of Allotments, to substitute Channel 39 for Channel 14 as currently allotted to Boise, Idaho, as proposed by KM's Petition for Rule Making, as amended,<sup>2</sup> and the Notice of Proposed Rule Making in the above-captioned proceeding.<sup>3</sup> In support of these Comments and the proposed channel substitution for Boise, KM submits the following:

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<sup>1</sup> Please note that counsel to KM has changed firms, from Irwin, Campbell & Tannenwald, P.C. to Jeffrey L. Timmons, P.C.; the correct current contact information is provided on the signature page to this pleading.

<sup>2</sup> See Petition for Rulemaking filed July 10, 1996 ("Petition"), as amended by an Amendment to Petition for Rulemaking filed May 15, 1997 ("First Amendment"), an Amendment to Petition for Rulemaking filed October 19, 1999 ("Second Amendment"), and an Amendment to Petition for Rule Making filed July 17, 2000 ("Third Amendment", and the Petition as amended by the First Amendment, Second Amendment and Third Amendment, the "KM Petition").

<sup>3</sup> See Amendment of Section 73.606(b), Table of Allotments, Television Broadcast Stations (Boise, Idaho), MM Docket No. 01-85, RM-9039, Notice of Proposed Rule Making, DA 01-863 (Video Services Division, released April 9, 2001)(the "NPRM").

## I. INTRODUCTION

2. Grant of the channel substitution proposed by KM would serve the public interest by facilitating a settlement that was first filed with the Commission over 5 years ago, in December 1995, by resolving objections raised by certain land mobile radio licensees that operate on frequencies adjacent to Channel 14, for which the pleading cycle was completed over 6 years ago, in April 1995.<sup>4</sup> The land mobile radio licensees suggested that an alternate channel be substituted for Channel 14. KM initially stated that it was agreeable to a channel substitution if the Commission made the channel change on its own motion (ironically, in the hope of avoiding any unnecessary delay on its application and the settlement). Later, just prior to the Commission's July 25, 1996 freeze on petitions for rule making to change the analog television table of allotments, KM filed the Petition to put a specific channel substitution proposal before the Commission. In the event that operation of a new television station on Channel 14 did cause interference to existing land mobile radio operations, the proposed channel change would serve the public interest by avoiding the expense that KM would occur in remedying such interference, through filters or other techniques.

## II. BACKGROUND

### A. KM's Channel 14 Application, And The Land Mobile Radio Petition To Deny

3. KM filed its application for a construction permit for a new commercial television station on Channel 14 at Boise, Idaho (File No. BPCT-941215KF) on December 15, 1994. On February 2, 1995, the Commission released a Public Notice accepting KM's application for filing,

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<sup>4</sup> Later, in April 1996, KM also filed an amendment to its pending application for Channel 14 at Boise (File No. BPCT-941215KF, Facility ID No. 35097) in response to a Commission letter request for more information on the potential for interference to existing land mobile radio stations.

and setting a March 20, 1995 cut-off date by which other parties could express interest in the proposed allotment. See Public Notice, Report No. A-188 at 2 (released February 2, 1995). International Television Network, Inc. ("ITN") was the only party to file a competing, mutually-exclusive application (File No. BPCT-950320KE) before the cut-off date.

4. In addition to the ITN application, a Petition to Deny was filed by certain land mobile radio licensees, claiming that KM's proposed operation of the Boise station on Channel 14 may cause objectionable interference to their existing operations on adjacent frequencies. KM filed an Opposition to this Petition, and the petitioners subsequently submitted a Reply.<sup>5</sup> In its Opposition, KM demonstrated that well-established Commission rules and precedent require the grant of its application for Channel 14.<sup>6</sup> However, KM has been on the record since early in 1995 that it did not object to a channel change, either on the Commission's own motion or in response to the KM Petition, to accommodate Petitioners' concerns.

**B. The Pending Universal Settlement**

5. On September 15, 1995, the Commission announced that it would waive, for a period of ninety days, the limit on settlement payments made to parties dismissing applications as part of

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<sup>5</sup> See Petition to Deny filed March 20, 1995 ("Petition to Deny"), by Idaho Communications, L.P. and Gem Communications, Inc. ("Petitioners"); Opposition to Petition to Deny filed April 4, 1995 ("Opposition") by KM; and Reply to Opposition to Petition to Deny filed April 28, 1995 ("Reply") by Petitioners.

<sup>6</sup> See Opposition at 3-7, citing 47 C.F.R. § 73.687(e) and Resolution of Interference Between UHF Channels 14 and 69 and Adjacent-Channel Land Mobile Operations, 6 FCC Rcd 5148 at ¶¶ 5 and 25 (1991)(when TV stations operate on Channel 14, the "few problems that have occurred have been resolved with little or no Commission intervention"; also, "most, if not all, channel 14 and 69 broadcast stations can coexist with land mobile operations on adjacent spectrum without objectionable interference and costly administrative intervention").

a universal settlement<sup>7</sup> of a frozen comparative proceeding.<sup>8</sup> On December 14, 1995, KM and ITN entered into a settlement agreement and filed a Joint Request for Approval of Universal Settlement (the "Joint Request"); the Joint Request has never been dismissed and remains pending. Under the terms of the original settlement, KM agreed to pay ITN \$200,000 upon approval of the settlement agreement, grant of the Joint Request, dismissal of ITN's application, and the grant of KM's application, and upon such actions becoming final orders.

6. On December 23, 1997, after exercising a contractual right to terminate the original settlement agreement due to the passage of time without Commission action, ITN filed a request to dismiss the Joint Request, but the Commission never acted upon that request. On August 20, 1999, and pursuant to an Amendment to Settlement Agreement executed on that date, ITN and KM jointly submitted a letter requesting that the Commission disregard the December 23, 1997 dismissal request, and promptly act on the Joint Request. KM notes that the Amendment to Settlement Agreement expressly (i) deleted any right of ITN to terminate the settlement agreement based on the passage of time; and (ii) provides that if the Commission precludes payment to ITN of a settlement payment in excess of ITN's documented out-of-pocket expenses, the settlement payment due to ITN would be limited to ITN's expenses, as may determined by the Commission. Based on this filing and the Amendment to Settlement Agreement, the Commission removed the mutually exclusive applications filed by ITN and KM from the September 28, 1999 closed broadcast auction.

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<sup>7</sup> See Public Notice, FCC Waives Limitations on Payments to Dismissing Applicants in Universal Settlements of Cases Subject to Comparative Proceedings Freeze Policy, FCC 95-391 (released September 15, 1995).

<sup>8</sup> The Commission imposed a freeze on comparative hearings, see FCC Freezes Comparative Proceedings, 9 FCC Rcd 1055 (1994), and Modification of FCC Comparative Proceedings Freeze Policy, 9 FCC Rcd 6689 (1994), after the holding in Bechtel v. F.C.C., 10 F.3d 875 (D.C. Cir. 1993).

7. Therefore, the Joint Request and the settlement agreement currently pending before the Commission are not dependent on a Commission waiver of the limits on settlement payments in Section 73.3525 of the Commission's rules, 47 C.F.R. § 73.3525. The settlement is also not contingent upon the channel substitution requested by the KM Petition - - indeed, KM has urged the Commission to act upon the Petition to Deny on the merits; grant the Joint Request and settlement; grant the KM application, and issue a construction permit for Channel 14, independent of whether the Commission eventually changed the allotment.

**C. Filing Of The Original Petition, And Summary Thereof**

8. On July 10, 1996, prior to the July 25, 1996 freeze on petitions for rule making to change the analog Television Table of Allotments, KM filed the Petition, originally proposing to substitute analog Channel 21 for Channel 14 at Boise, Idaho. The substitution of an alternate channel for analog Channel 14 would resolve any potential interference to existing land mobile radio stations or studio-transmitter links ("STLs"), thereby alleviating the potential additional costs that may be associated with resolving any actual interference that might occur, and which would be unique to the proposed operation on Channel 14. In the Petition, KM demonstrated that its proposed channel could be allotted to Boise in compliance with both the minimum distance separation requirements of the Commission's rules as well as the Commission's policies to protect future advance television station channel allotments. KM also showed that there was at least one additional channel available for allotment in Boise for other parties that might have an interest in serving the Boise community at some future date, and therefore its allotment proposal and the amendment of its pending application to specify any alternate channel were entitled to cut-off protection under established Commission precedent.



9. The substitution of an alternate channel as requested by KM would resolve the potential land mobile radio interference concerns, facilitate the resolution of a comparative proceeding, and remove an obstacle to the approval of a settlement agreement first filed in, and the related Joint Request pending before the Commission since, December 1995. KM requested that it be allowed to amend its pending application to specify the new channel and retain cut-off protection, consistent with established Commission precedent. If KM had not requested this substitution, valuable Commission resources would be required to decide the land mobile radio petition on the merits, in connection with the originally proposed Channel 14 application. Also, KM potentially could end up spending an estimated \$500,000 to \$1,000,000 to resolve any actual land mobile radio interference that may occur, a solution that is undesirable to KM and the local land mobile radio industry when there are sufficient channels in the area to resolve this issue via a channel substitution.

**D. Subsequent Amendments To The Petition**

10. **The First Amendment.** In the DTV Sixth Report,<sup>9</sup> the Commission allotted Channel 21, the channel originally requested by KM in the Petition, as the DTV channel to be paired with analog Channel 4 in Boise, despite its stated intention in the DTV proceeding to "avoid creating DTV allotments that would conflict with proposed new NTSC allotments" proposed in petitions for rule making filed before the July 25, 1996 adoption of the Sixth Further Notice of Proposed Rule Making in the DTV proceeding. See DTV Sixth Report at 14639. Since Channel 21 was no longer available for substitution for Channel 14, KM submitted its First Amendment to the Petition on May 15, 1997, requesting that the Commission substitute analog Channel 33 for Channel 14 at Boise,

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<sup>9</sup> See Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, Sixth Report and Order, 12 FCC Rcd 14588 (1997) ("DTV Sixth Report").

instead of Channel 21. The Commission has specifically stated that such amendment of the Petition is permitted, even when such an amendment is filed after July 25, 1996.<sup>10</sup>

11. **The Second Amendment.** The Second Amendment was filed after the DTV Second Recon Order<sup>11</sup> was released, to demonstrate that KM's proposed analog channel substitution would not conflict with any then-current DTV station allotment, authorization, application or rule making petition. In addition, KM also requested in the Second Amendment that the Commission substitute analog Channel 39 for Channel 14 at Boise, instead of Channel 33, in order to avoid displacing an LPTV station on Channel 33 (as an LPTV licensee itself, KM was sensitive to not unnecessarily displacing an existing LPTV operation). In short, KM would be happy with any alternate channel within the core spectrum (i.e., Channels 2-51) that the Commission cares to substitute for Channel 14, or even to continue on Channel 14 -- whatever it takes to get the over 5-year old settlement and petition for rule making process completed.

12. **The Third Amendment.** In the DTV proceeding, the Commission stated that it would open a filing window, announced by Public Notice, during which pending petitions for rule making to amend the analog Television Table of Allotments that would conflict with a DTV station allotment, authorization, application or rule making proposal could be amended to eliminate the DTV conflict, or to demonstrate that no such conflicts with DTV stations exist, see DTV Second

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<sup>10</sup> See, e.g., Amendment of Section 73.622(b) Table of Allotments, Digital Television Broadcast Stations (Salt Lake City, Ogden and Provo, Utah), 15 FCC Rcd 10568 at n.5 (2000)(an amendment filed after July 25, 1996 to a petition for rule making to change an analog television allotment filed before July 25, 1996 to change the channel proposed to be substituted was permitted, provided there was no adverse impact on DTV).

<sup>11</sup> See Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, MM Docket No. 87-268, Second Memorandum Opinion and Order on Reconsideration of the Fifth and Sixth Report and Order, 14 FCC Rcd 1348 (1998) (the "DTV Second Recon Order").

Recon Order at ¶¶ 40-42, which policy was implemented by a subsequent Commission Public Notice.<sup>12</sup> The Engineering Report filed with the Second Amendment and the Engineering Supplement filed with the Third Amendment demonstrated that analog Channel 39 may be allotted to Boise in compliance with the minimum distance separation requirements of the Commission's rules and policies protecting DTV station allotments, authorizations, applications and rule making petitions. The proposed Channel 39 allotment is approximately 555 kilometers from Portland, Oregon, and therefore was not subject to the advanced television freeze.

**E. KM Is Not Requesting A Second Paired Channel For DTV**

13. KM also notes that in the Second Amendment it deleted prior requests made in the Petition and First Amendment that a DTV channel be allotted as a second paired channel with any alternate channel substituted for analog Channel 14 at Boise. KM originally requested a second paired channel for DTV at a time when the issue of whether new analog television station permittees would receive a second DTV channel was an open issue. Now that the Commission and the courts have resolved this issue, KM understands and accepts that a second paired channel will not be allotted for its proposed station for the conversion to DTV.

**III. KM's APPLICATION IS ENTITLED TO CUT-OFF PROTECTION**

14. The Commission has consistently allowed an additional channel to be allotted to a community if the only vacant channel is the subject of a comparative proceeding, and the new

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<sup>12</sup> See Public Notice, Mass Media Bureau Announces Window Filing Opportunity for Certain Pending Applications and Allotment Petitions for New Analog TV Stations, DA 99-2605 (released November 22, 1999); see also, Public Notice, Window Filing Opportunity For Certain Pending Applications and Allotment Petitions for New Analog TV Stations Extended to July 15, 2000, DA 00-536 (released March 9, 2000).

channel can be added consistent with other allotment policies, such as the minimum distance separation rules and the advance television freeze policy, and where additional channels are available for allotment in response to other expressions of interest.<sup>13</sup> The Engineering Reports attached to the Petition and the Second Amendment demonstrated that at least one additional channel was available for allotment to accommodate other expressions of interest in serving Boise, and that there likely are more alternate channels available in the Boise area for other expressions of interest. The Commission's NPRM also recognizes that it "will not accept competing expressions of interest in the use of television channel 39 at Boise." See NPRM at ¶ 3. Accordingly, KM requests that it be authorized to amend its pending application to specify Channel 39 while retaining cut-off protection. Such action would allow the Commission to resolve the potential land mobile radio concerns and process the settlement agreement and Joint Request more promptly, thereby expediting the grant of KM's application and the initiation of a new television service to Boise.

#### **IV. KM'S INTENTION TO PROMPTLY CONSTRUCT THE STATION**

15. KM hereby states its present and continuing intention to amend its pending application to specify analog Channel 39, or any other alternate channel in the core spectrum that the Commission may elect to substitute for analog Channel 14, with cut-off protection for KM, and to proceed promptly to build a station upon the grant of a construction permit authorizing the construction of a station. See NPRM at ¶ 5. The public interest would be served by potentially

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<sup>13</sup> See, e.g., Sioux Falls, South Dakota, 11 FCC Rcd 1069 (Allocations Branch 1996); see also, Roseburg, Oregon, 6 FCC Rcd 4369 (1991) and Copeland, Kansas, 5 FCC Rcd 7682 (1990) (petitioners may amend pending applications to change channels and retain cut-off protection where no other timely-filed expressions of interest were filed or, if expressions of interest were filed, there is at least one additional channel which could be allotted to accommodate such interest).

providing a third commercial local television service licensed to Boise, and by conserving the Commission resources that otherwise would be required to resolve the land mobile radio petition to deny and to resolve this comparative proceeding.

## V. CLASS A TELEVISION ISSUES

16. Based on its review of the Commission's Public Notice listing the LPTV stations certified as eligible for Class A status,<sup>14</sup> KM is not aware of any LPTV station certified as eligible for a Class A license that would be adversely impacted by the proposed channel substitution. In addition, in the Third Amendment KM specified "reference facilities" for its proposed Channel 39 allotment operation, as required by the Commission in the Class A proceeding.<sup>15</sup> Therefore, the KM Petition and the proposed channel change fully comply with the Commission's rules and policies adopted in the Class A proceeding.

17. KM also notes that the Commission has expressly recognized that, in certain circumstances, petitions for rule making to amend the analog Television Table of Allotments filed prior to the November 29, 1999 enactment of the Community Broadcasters Protection Act of 1999 (the "CBPA", i.e., the Class A legislation), such as KM's pending Petition to substitute an alternate channel for analog Channel 14 at Boise, are not required to protect -- and indeed are entitled to

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<sup>14</sup> See Public Notice, Certificates of Eligibility for Class A Television Station Status, DA 00-1224 (released June 2, 2000).

<sup>15</sup> See Engineering Report attached to the Third Amendment. The reference facility parameters specified by KM are geographic coordinates (NAD27) of 43° 45' 18" north latitude, 116° 05' 52" west longitude; 2570 kilowatts effective radiated power, and a directional antenna with a height of the antenna radiation center of 812 meters above average terrain and of 2195 meters above mean sea level. Id. The site elevation above mean sea level of 2146 meters above mean sea level and the radiation pattern and orientation of the directional antenna remain the same as proposed in the original pending application, for Channel 14.

protection from -- Class A eligible LPTV stations.<sup>16</sup> In Achernar, the Commission expressly found that an analog petition for rule making filed prior to the enactment of the CBPA -- such as the analog Channel 39 substitution KM has had on file since October 19, 1999 (i.e., prior to the November 29, 1999 enactment of the CBPA) -- was entitled to protection where, as in KM's case with Boise, there is a settlement agreement pending that proposes "a reasonably ascertainable predicted Grade B contour". Achernar at ¶ 20. KM submits that the circumstances in this case are as extraordinary and as compelling as, if not more compelling than, the facts in Achernar. In the event that any LPTV station files comments opposing the proposed substitution of Channel 39 for Channel 14 based on claims that it is certified as eligible for Class A status, KM would submit a comparison of the extraordinary facts of this case to Achernar.

## **VI. CHANNEL SUBSTITUTION ON THE COMMISSION'S OWN MOTION**

18. Achernar also makes clear that the Commission may substitute Channel 39 (or some other alternate channel) for analog Channel 14 at Boise on its own motion, under its authority under Section 316(a) of the Act, 47 U.S.C. § 316(a), and Section 1.87 of the Commission's rules, 47 C.F.R. § 1.87, even without the benefit of a petition for rule making (which KM has pending here) or even further proceedings. See Achernar at ¶¶ 17-19, 24-25 (finding that since the analog Television Table of Allotment has "ceased to function as an evolving mechanism", and as such modifying it is "an

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<sup>16</sup> See Achernar Broadcasting Company, MM Docket No. 86-440, Memorandum Opinion and Order, FCC 00-149, 15 FCC Rcd 7808 at ¶ 20 (released April 28, 2000) ("Achernar"). Although the Commission in the Class A proceeding declined to adopt the precedent from Achernar as a general rule, see Establishment of a Class A Television Service, MM Docket No. 00-10, Memorandum Opinion and Order on Reconsideration, FCC 01-123 at ¶ 57 and n.125 (released April 13, 2001), the precedent remains valid and may be applied in the context of specific cases where the facts are as extraordinary as in the Achernar case.

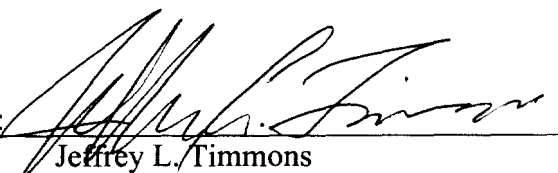
essentially material act designed purely to ensure the continuing accuracy of the table"). Indeed, KM suggested that the Commission take the approach of substituting an alternate channel of its choosing and on its own motion back in 1995, see Opposition at 7, even before filing the Petition in 1996, in the hopes of getting the matter moving toward resolution. In the event that the Commission determines that Channel 39 is not a suitable alternate channel to substitute for Channel 14, KM respectfully requests that the Commission identify and substitute any other channel within the core (i.e., Channels 2-51) for Channel 14, on its own motion.

## VII. CONCLUSION

19. WHEREFORE, in light of the showings set forth herein, KM respectfully requests that the Commission grant the KM Petition, substitute analog Channel 39 for the current analog Channel 14 allotment at Boise, Idaho, and permit KM to amend its pending application to specify Channel 39 with cut-off protection, or such alternate relief as may be consistent with these Comments of KM expressed herein.

Respectfully submitted,

**KM Communications, Inc.**

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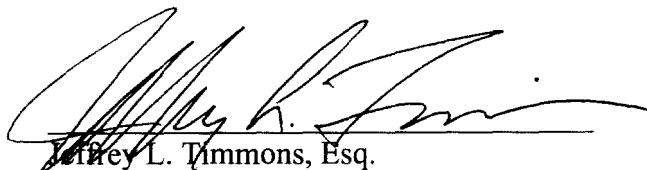
**CERTIFICATE OF SERVICE**

I, Jeffrey L. Timmons, hereby certify that on this 30<sup>th</sup> day of May, 2001, copies of the foregoing "Comments of KM Communications, Inc." have been served by Airborne Express then hand delivery or by United States priority mail, postage prepaid, upon the following:

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